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Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1996

JAMES W. HELTON, II,

Petitioner,

versus

STATE OF INDIANA,

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE INDIANA COURT OF APPEALS, FIRST DISTRICT

PETITION FOR CERTIORARI

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27 pp

QUESTIONS PRESENTED FOR REVIEW

Whether Indiana's Criminal Gang Activity Statue (Gang Statue) is unconstitutional because:

I. It is void for vagueness under the First and Fourteenth Amendments to the U.S. Constitution.

II. It is unconstitutionally overbroad and impermissibly infringed upon Helton's right of association guaranteed under the First and Fourteenth Amendments to The U.S. Constitution.

III. It deprived Helton of equal protection of the laws as guaranteed under the Fourteenth Amendment to the U.S. Constitution.

LIST OF PARTIES TO PROCEEDINGS

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CITATION TO OFFICIAL REPORT OF OPINIONS

Citation to Official Decision of the Indiana Court of Appeals:

624 N.E. 2d 499

Citation to Official Decision of the Indiana Supreme Court denying Petition for Transfer

See Appendix to Petition For Certiorari

JURISDICTIONAL GROUNDS FOR WRIT OF CERTIORARI

Date of entry of decision of Indiana Court of Appeals, First District

December 1, 1993

Date of entry of decision of the Indiana Supreme Court denying Transfer:

August 6, 1996

Date of Entry of Denial of Petition for Re-Hearing:

No Petition for Re-Hearing allowed Pursuant to Indiana appellate Rule 11(B) (8).

Statutory Provision granting authority to review:

28 U.S.C. § 1257

VERBATIM RECITATION OF PERTINENT STATUTES AND CONSTITUTIONAL PROVISIONS

I.C. 35-45-9-3

(verbatim reproduction contained in Appendix)

I.C.35-45-9-1

(verbatim reproduction continued in Appendix)

United States Constitution, Amendment I

(verbatim reproduction contained in Appendix)

United States Constitution, Amendment XIV

(verbatim reproduction contained in Appendix)

STATEMENT OF THE CASE

On February 12, 1992, several youths participated in a meeting behind the Sycamore Trace Apartments in Mooresville, Indiana (Record p. 252). Travis Hammons was initiated into the group voluntarily (Record p. 254). An initiation rite was a requirement for membership in the group (Record p. 254).

Scott Bullington, a member of the group testified that Travis Hammons knew what the initiation rite was and consented to it (Record p.228).

Officer Randy Earles also testified that Travis Hammons knew what the initiation rite involved and agreed to participate (Record p. 258).

Officer Earles further testified that he had no information or allegations concerning any batteries committed by members of the group on individuals outside the group(Record p. 260).

On April 24, 1992, Information was filed charging the Defendant, James W. Helton, II, with Participation in a Criminal Gang. On April 27, 1992, the Morgan Circuit Court waived Juvenile Jurisdiction over the Defendant to the Morgan Superior Court.

On June 3, 1992, the Court issued an Entry and Order Amending the Information to Criminal Gang Activity.

On January 13, 1993, the Defendant appeared by counsel at a Hearing on Defendant's Motion in Limine and Defendant's

Objection to the State's Motion to Amend Information. The Court ordered that the previous Order granting the State's previous Motion to Amend be stricken and ruled on Defendant's Motion in Limine.

On January 14, 1993, a Court Trial was held. The Defendant appeared in person and by counsel. The Defendant was advised of and waived his right to a jury trial. The Defendant's guardian also waived Defendant's right to a jury trial. The Court took the matter under advisement.

The Court issued an Entry and Order Re: Finding of Guilt on January 21, 1993, which state as follows:

> This Court having held a Court Trial on January 14, 1993. The State having appeared in person and with counsel. The Defendant having been advised of his rights and having waived jury trial in this matter. The State having presented it's evidence herein;
>
> THE COURT NOW FINDS that the evidence presented by the State convinces the Court beyond a reasonable doubt that the Defendant is guilty of Criminal Gang Activity, I.C. 35-45-9-3.
>
> THE COURT NOW ORDERS that a presentence investigation report be conducted by the Probation Department within 5 days of this order for the purpose of furnishing

information necessary to conduct the presentence investigation.

The Defendant shall report to the Morgan County Probation Department within 5 days of this order for the purpose of furnishing information necessary to conduct the presentence investigation

On March 1, 1993, the Court held Sentencing. The Defendant appeared in person and with counsel. The Court sentenced the Defendant as follows:

The defendant be fined in the sum of $1.00, and in addition, the court costs in the amount of $113.00 be paid; that the fine and costs be paid pursuant to an order of probation filed.

The defendant be sentenced to imprisonment in the Indiana Department of Correction for a period of 3 years with a jail time credit for 8 days, and 16 days Class credit time; however, serving of said sentence was withheld with an order of probation for a term of 6 months to be served in the Morgan County Jail.

That the sentence be served consecutively to any other time.

The Court further ordered:

That any bail filed in this case be released.

That the Defendant is to report to the Morgan County Jail on June 7, 1993, at 8:00 a.m.

A Praecipe was filed with the Clerk of the Morgan Superior Court on March 5, 1993. The Record of the Proceedings was filed with the Clerk of the Indiana Court of Appeals on May 28, 1993. The Defendant is currently out on bond.

On December 1, 1993, the Indiana Court of Appeals, First District, affirmed Appellants conviction and upheld the constitutionality of the Indiana Gang Statute, by written opinion. On December 21, 1993, Appellant filed his Petition for Rehearing with the Indiana Court of Appeals. The Petition for Rehearing was denied of January 13, 1994.

On February 1, 1994, the Appellant filed his Petition for Transfer to the Indiana Supreme Court. The petition for Transfer denied on August 6, 1996.

ARGUMENT

I. THE CRIMINAL GANG ACTIVITY STATUTE IS VOID FOR VAGUENESS UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION

The Indiana Criminal Gang Activity Statute is vague in violation of the First and Fourteenth Amendments to the U.S. Constitution, Article 1, §31 and Article 1, § 9 of the Indiana Constitution.

Void for vagueness analysis involves determining whether adequate notice of sanctions is given to potential offenders and whether the statute involves arbitrary and discriminatory enforcement. Sherelis v. Duckworth, 675 F.Supp. 1144 (N.D. Ind. 1987).

The statute in question fails both parts of the vagueness test. The language of the statute is ambiguous and leaves persons of average intelligence without a clue as to what conduct is prohibited. The statute reads as follows:

> A person who knowingly or intentionally actively participates in a criminal gang commits criminal gang activity, a Class D felony.

I.C. 35-45-9-3

The definition of "criminal gang" is not helpful in clarifying the conduct which is prohibited. The definition is as follows:

As used in this chapter, "criminal gang" means a group with at least five (5) members that specifically:

(1) either:

(A) promotes, sponsors, or assists in; or

(B) participates in ; and

(2) requires as a condition of membership or continued membership; the commission of a felony or an act that would be a felony if committed by an adult or the offense of battery (I.C. 35-42-2-1)

I.C. 35-45-9-1

The definition of a gang requires that it be a group of more than five individuals who commit battery, a felony, or an offense that would be a felony if committed by an adult. I.C. 35-45-9-1

In this case the Defendant was prosecuted under the statute for allegedly committing a battery on another member of his group, as part of an initiation ritual. (Record p. 254, 258). There was no commission of an independent felony or battery against someone other than a member of the group itself. (Record p. 260).

Appellee, in their brief, sets out the statutory elements of the crime as follows:

1. The Defendant;

2. Knowingly or intentionally;

3. Participated in;

4. The IGD, which had at lest five (5) members;

5. Which required the commission of a Battery;

6. For membership or continued membership.

Brief of Appellee p. 5.

Under the State's interpretation of the statute in question, the term "participated in" relates to "The IGD". Another logical interpretation of the statute is that the term "participated in" modifies, "the commission of a Battery".

It would appear from a close reading of the Court of Appeal's decision that they have taken the latter approach. The Court of Appeals, in its decision stated, "Furthermore, we construe the Gang Statute to require that the active member with guilty knowledge also have a specific intent or purpose to further the group's criminal conduct before he may be prosecuted". Helton v. State, 624 N.E.2d. 499 (Ind. App., 1993) at. 508 Further in footnote 13, the Court when on to state,"

The Supreme Court and Court of Appeals construed:

> "or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons [who teach, advocate, or encourage the violent overthrow of government], knowing the purpose thereof, is guilty of a felony .

> ..
> to mean that only active members, and not merely passive, inactive or purely technical members,, with knowledge of the groups's illegal advocacy and a specific intent to bring about the group's criminal advocacy could be prosecuted for acquisition or holding of membership in such a group.

Id. at 508-509.

Clearly this wording indicates that something greater than mere participation in the group is necessary for prosecution under this statute. Therefore, the term "participated in", under the Court of Appeal's analysis, modifies the commission of a criminal act. Otherwise, mere passive membership in a group which meets all of the other statutory qualifications would subject a Defendant to prosecution under this statute.

One need only look at the different interpretation put on this statute by the State, and by the Court of Appeals to see that this statute must be declared unconstitutionally vague. If the State and the Judges of the Indiana Court of Appeals cannot agree as to the proper interpretation of a statute, clearly the statue is not written in a form which affords persons of reasonable intelligence what is proscribed conduct.

In this case an act to someone outside the group should be required because as it stands, the definitional requirement of the

crime (a group who commits battery) and the prohibited act (battery) are the same act.

The statute fails the second prong of the vagueness test because it encourages arbitrary and discriminatory enforcement. Sherelis v. Duckworth, 675 F.Supp. 1144 (N.D. Ind. 1987). As Justice O' Conner stated in the case of Kolander v. Lawson, 461 U.S. 352 (1983),

> Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of the vagueness doctrine "is not actual notice, but the other principle element of the doctrine - the requirement that a legislature establish minimal guidelines to govern law enforcement"

Kolander at 357-358, citing Smith v. Gogeun, 415 U.S. 556, at 574, (1974). The Indiana Gang Statute provides no such legislative guidelines.

The statute seeks to prohibit certain groups of individuals from freely exercising their right of association as guaranteed by the First and Fourteenth Amendments to the U.S. Constitution, Article 1, § 9 and Article 1, §31 of the Indiana Constitution. The decision as to which groups may associate without fear of criminal repercussions and which may not, is vested in the prosecutors, who decide whom to prosecute under the statute.

Prosecutors have the power to choose when to prosecute. Worthington v. State

(1980), Ind. App., 409 N.E.2d 1261. However, this discretion is not boundless. The practical effect of the vagueness doctrine is not to make statutes readable by the laity but to limit the discretion of police and prosecutors- a purpose of the doctrine that is receiving increasing recognition. Waldron v. McAtee, 723 F.2d 1348, (7th Cir. 1983).

Under the Indiana Criminal Gang Activity Statute, prosecutors are vested with unfettered discretion in choosing to whom to apply the statute. Applying the vagueness doctrine to this law requires that it be voided, due to the lack of any checks on prosecutorial discretion. Prosecutors are not chosen to dictate to society which associations are permissible and which are not. The danger of unfettered prosecutorial discretion is elevated when constitutional rights are inhibited by the statute in question. Gov't Suppliers v. Bayh, 734 F.Supp. 853 (S.D. Ind. 1990).

A statute must be subjected to stricter scrutiny when determining the constitutionally permissible degree of vagueness, due to the inhibiting effect on a constitutionally protected right. Id at 868.

The statute prohibits the Defendant from meeting with the members of his group, since the prosecutor chose to bring charges against the Defendant for this particular association.

An additional problem with this statute is that once a group is labeled as a "criminal gang" under the statute, nothing in the statute prevents prosecutors from

charging the members with "Criminal Gang Activity" at any point in the future. In order to become a "criminal gang" a group of five or more individuals must: promote, sponsor, assist or participate in; and require as a condition of membership the commission of a felony, an offense that would be a felony if committed by an adult, or the offense of battery. I.C. 35-45-9-1.

Even if the members do not commit any criminal offenses beyond the one necessary to label them as a criminal gang, they may be prosecuted for "Criminal Gang Activity", which is " knowingly or intentionally actively" participating in a criminal gang. I.C. 3545-9-3

In this situation persons charged under Indiana's Criminal Gang Activity Statute can be prosecuted for maintaining their statuses as gang members, regardless of whether or not they commit any crimes. The U.S. Supreme Court ruled that one may not be prosecuted for a status in Robinson v. California, 370 U.S. 660 (1962) .

Additionally, the statute inhibits the Defendant's freedom of association as protected by the First Amendment to the U.S. Constitution. As discussed above, the Defendant could be prosecuted for being the member of a gang, even if the members of the "gang" remain honest, law-abiding citizens for the rest of their lives. The Defendant could be inhibited from exercising his right of association, for fear that he will be arrested for Criminal Gang Activity if seen with the members of what was once labeled as

a criminal gang for the purposes of the statute.

The Defendant's status as a "gang member" will continue despite the underlying felony or battery required for that status being outside the statute of limitations. The statute of limitations for Class D felonies (i.e. Criminal Gang Activity) is as follows:

> (a) Except as otherwise provided in this section a prosecution for an offense is barred unless it is commenced :
>
> (1) within five (5) years after the commission of a Class B. Class C, or Class D felony. . .

I.C. 35-41-4-2.

The Defendant will maintain his status as a gang member ad infinitum, and nothing in the statute prevents a prosecutor from charging him with Criminal Gang Activity at any point beyond the five year statute of limitations for Class D felonies.

The Court of Appeals, in its written decision, attempted to provide the "minimal legislative guidelines" to differentiate permissible batteries from illegal and therefore not constitutionally protected batteries. They accomplished this by carving a number of exceptions on to the case of Jaske v. State, (1989), Ind., 539 N.E.2d 14. Of particular interest is the second created exception,

(2) Where it is against public policy to permit the conduct or resulting harm even though it is consented to, . . .

Helton v. State, at 514.

This exception merely shifts the lack of constitutional safeguards concerning reasonable knowledge of proscribed activities and the lack of legislative guidelines from the Gang Statute as a whole, to the portion of the Statute defining battery. This exception would allows unfettered discretion for the State to prosecute consensual battery whenever it deemed that the battery was against "public policy".

While it may be argued that prosecutorial discretion provides an avenue of escape, the U.S. Supreme Court has made it clear that statutes must contain specific guidelines to prohibit the state from making a standardless sweep to pursue their own predilections. The legislature may not abdicate their duty to provide those standards. Smith v. Gogeun, 415 U. S. 556 (1974).

No reasonable legislative guidelines or standards are present in this statute. The Court of Appeals, by judicial fiat, has attempted to carve the necessary guidelines. However, ruling precedents make it clear that it is the duty of the legislative branch, and not the judicial branch to provide these standards.

This is particularly true when the judicially created guidelines still run afoul

of the exact same problems, by creating a guideline as likely to encourage discriminatory enforcement as "against public policy". Helton, at 514.

Therefore Defendant asserts that I.C. 35-45-9-3 is void for vagueness under both the U.S. and Indiana Constitutions.

II. THE CRIMINAL GANG ACTIVITY STATUTE IS UNCONSTITUTIONALLY OVERBROAD, AS IT INFRINGES UPON DEFENDANT'S FIRST AMENDMENT RIGHT OF ASSOCIATION.

The Indiana Criminal Gang Activity Statute is unconstitutional due to its overbreadth. The statute infringes upon the right of association, which is protected by the First Amendment to the U.S. Constitution.

The United States Supreme Court has recognized a distinction between the vagueness doctrine and the overbreadth doctrine. Zwickler v. Koota, 389 U.S. 241 (1967).

The right of association guaranteed by the First Amendment can foreseeably be infringed by the Criminal Gang Activity Statute. The terms are so broad that any number of permissible associations could potentially be prosecuted, in violation of their rights of association.

The Indiana Supreme Court has held:

> A penal statute is unconstitutionally overbroad if its sanctions are applicable to activities that are protected by the First Amendment;

> invalidity of such statute rests on fact that it constitutes a substantial deterrent to free exercise of important First Amendment rights.

Grody v. State, (1972), 257 Ind. 651, 278 N.E.2d 280.

The significance of the First Amendment rights was emphasized by the U.S. Supreme Court:

> The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchannelled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. . . . These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.

NAACP v. Button, 371 U.S. 415, 432-433 (1962).

In this case, the Defendant's right of association, as guaranteed by the First Amendment, was infringed upon by prosecution under the Criminal Gang Activity Statute. The Defendant's conduct, in associating with a

group of juveniles, was protected by the First Amendment.

Even if the Defendant's particular acts were not protected by the First Amendment, he nevertheless has standing to challenge overbreadth grounds. The Defendant may challenge the statute if it may conceivably be applied unconstitutionally to others, depriving them of their First Amendment rights. 16A Am. Jur. 2d Constitutional Law § 461 (1979), Osborne v. Ohio, 110 S.Ct. 1691 (1990), Footnote 8, citing Massachusetts v. Oakes, 109 S.Ct. 2633 (1989)

Generally, constitutional rights are personal to an individual, and violation of a third party's constitutional rights cannot be claimed by Defendant. Kirkland v. State (1968), 249 Ind. 305, 232 N.E.2d 365, 366. However, the U.S. Supreme Court has recognized an exception to the standing requirement in the area of First Amendment rights. 16A Am. Jur. 2d Constitutional Law § 461 (1979). Due to the importance of the First Amendment freedoms to our society, the Court has held that, although a statute or ordinance may be neither vague, overbroad, nor otherwise invalid as applied to the conduct charged against a particular defendant, he is permitted to raise its unconstitutional vagueness or overbreadth as applied to other persons not before the court. 16 A Am. Jur. 2d Constitutional Law § 461 (1979), citing Bigelow v. Va., 421 U.S. 809 (1974); see also, Osborne v. Ohio and Massachusetts v. Oakes, supra.

The statute is overbroad because it can be invoked to prosecute this Defendant for exercising his right of association. At any

point in the future the Defendant can be prohibited from associating with the members of his group, or risk prosecution for associating with members of a group that was once labeled as a criminal gang by the prosecutor.

Furthermore, Appellant may challenge the statute on overbreadth grounds even if his particular conduct was not constitutionally protected. Any person may challenge a statute that may conceivably interfere with the free exercise of some person's First Amendment rights. The U.S. Supreme Court has done away with the standing requirement in the area of First Amendment rights, due to the importance of these rights to our society.

An example of legally permissible conduct that could conceivably be inhibited by the statute is participation in high school football:

> A football team is a group of at least five members that specifically:
> (1) either:
> (A) promotes, sponsors, or assists in; or
> (B) participates in; and
> (2) requires as a condition of membership or continued membership; the offense of battery (i.e. sacking quarterbacks, tackling running backs and blocking)

I.C. 35-45-9-1.

The football players must perform these acts to make the team and to remain on the team. These acts clearly would constitute battery if not performed on the playing

field. This is legally permissible conduct that could potentially be inhibited by the Criminal Gang Activity Statute.

Numerous other "socially redeeming" activities would likewise be prohibited under this statute. For example, circumcision is a requirement of membership for males into the Jewish faith. The act of circumcision is clearly a touching in a "rude, insolent or angry manner". Within a significant segment of our society, this "battery" is not only socially valued, but an absolute necessity. However, this "battery", even though consensual, would still subject the Rabbi to prosecution from an Anti-Semitic prosecutor.

Equally true would be the possibility of the prosecution of the entire police community. While no one would seriously question the value that the police have to society, they are a group of five or more which requires hand-to-hand combat techniques at the Police Academy.

While the Court of Appeals may choose to label this statute as not overbroad because of a single impermissible application, these examples make it clear that a whole range of activities are potentially proscribed under this statute. Helton, at 514. The only way out of this dilemma is to relocate these constitutional concerns into the "battery" portion of the statute; a view which was espoused by the Court of Appeals in it's decision. However, as previously discussed, the Court of Appeal's exceptions carved into Jaske run afoul of the constitutional vagueness doctrine.

Appellant asserts that Indiana's Criminal Gang Activity Statute is unconstitutionally overbroad.

III. THE CRIMINAL GANG ACTIVITY STATUTE DEPRIVED THE DEFENDANT OF EQUAL PROTECTION UNDER THE LAWS AND EQUAL PRIVILEGES.

The Indiana Criminal Gang Activity Statute deprived the Defendant of Equal Protection of the laws, as guaranteed by the 14th Amendment to the U.S. Constitution.

The relationship between the state and federal clauses is as follows:

> When the equal protection clause of the Fourteenth Amendment of the United States Constitution [U.S.C.A. Const. Amend. 14] has been violated, it necessarily follows that the equal privileges provision of the

Indiana Constitution has also been violated.

Indiana High School Athletic Ass'n v. Raike (1975), 164 Ind. App. 169, 329 N.E.2d 66, quoting Const. Art., § 23.

The equal protection clause does not prevent a state from indulging in reasonable legislative classification. Decatur County Rural Elec. Membership Corp. v. Public Service Co. (1973), 261 Ind. 128, 301 N.E.2d 191, 197.

However, a law that is not facially discriminatory may have equal protection problems if it is discriminatorily enforced

or applied. Center Township v. Coe,(1991), Ind. App., 572 N.E.2d 1350.

In the case at bar, the statute has been and will continue to be applied in a discriminatory manner.

The statute is equally applicable to a variety of group including football teams, boxing clubs, fraternities and gangs. However, a prosecutor is able to pick and choose among these groups and prosecute the associations she or he considers undesirable. The groups chosen tend to be comprised of poorer, disadvantaged youths such as groups that refer to themselves as, or are labeled as, gangs.

Under the trial court's interpretation of the statute, the prosecutor may prosecute a "gang" for Criminal Gang Activity (a Class D felony), but prosecute a fraternity under the Hazing Statute (I.C. 35-42-2-2) for the same conduct.

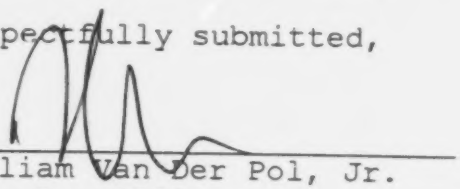
This type of discriminatory application of the law amounts to a denial of equal protection of the laws to those individuals in the groups considered undesirable and prosecuted under the Criminal Gang Activity Statute for intragroup violence.

In addition, the judicially created classification of a battery "against public policy . . . even though it is consented to" would allow discriminatory enforcement against those groups deemed not worthy of protection. As such, this enforcement would also violate Federal and State Equal Protection Guarantees.

CONCLUSION

Based upon the foregoing, the Petitioner respectfully requests this Court to grant Certiorari to decide the important Federal Questions presented, and to clarify conflicting decisions of the lower courts.

Respectfully submitted,



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